No. 22507-A

United States
COURT OF APPEALS
for the Ninth Circuit

In the Matter of Portland Newspaper Publishing Company, Inc., Bankrupt,

EVERETTE H. WILLIAMS,

Appellant,

v.

ROSE CITY DEVELOPMENT COMPANY, INC.,

Appellee.

BRIEF OF APPELLEE

On Appeal from the United States District Court for the District of Oregon

FILED

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STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

A. Issues not properly before this court.

1. May the trustee raise in this court for the first time the contention that a new financing statement and security agreement had to be signed and filed after the corporate merger of Portland Reporter Publishing Company, Inc. and Portland Newspaper

Publishing Company, Inc., when this issue was not raised before the referee or before the District Court?

2. May the trustee raise in this court the contention that the trustee may subrogate to any subordination rights of Davis against Rose City when Davis' subordination rights were denied by the District Court in its final order and excluded by the trustee in his notice of appeal?

B. Issues properly before this court.

1. Was the District Court correct in holding that the bankrupt did not give a voidable preference to Rose City, the secured creditor, when the level of assigned accounts receivable remained approximately constant during the four months before the bankruptcy and always exceeded the amount of the debt?

2. Was the District Court correct in holding that the "floating lien" section of the Oregon Uniform Commercial Code (which is identical with the law of the District of Columbia and every state except Louisiana) is valid?

STATEMENT OF THE CASE

This controversy arises from a proceeding in bankruptcy in which the trustee in bankruptcy filed a petition seeking to have Rose City Development Company, Inc., (hereinafter called "Rose City") and others pay over to the bankruptcy estate the proceeds of certain of the bankrupt's accounts receivable. The

referee ignored the level of assigned accounts receivable and held that the "floating lien" section of the Uniform Commercial Code violates federal law. The District Judge reversed the referee holding that Rose City was not given a voidable preference and upheld the "floating lien" section of the Uniform Commercial Code. The trustee has appealed and the jurisdiction of this court is based upon an appeal from the final order below pursuant to 11 U.S.C. § 47(a).

The following chronology may be helpful in understanding this case.

1. February 8, 1960—Portland Reporter Publishing Company, Inc. incorporates and begins publication of the "Portland Reporter," a weekly and later daily newspaper in Portland, Oregon (Ex. 2).

2. November 16, 1963—Rose City loans Reporter $45,000, consolidating previous loans (Ex. 17, Tr. p. 137).

3. November 22, 1963—Rose City loans Reporter additional $10,300 and the parties enter into an "Accounts Receivable Loan and Security Agreement" covering all loans and assigning "all accounts receivable of the debtor now existing or hereafter arising (herein called 'accounts')" (except those actually assigned to DuBay, and, by later modification, also except those actually assigned to Davis) (Tr. p. 237; Ex. 17).

4. November 26, 1963—Financing statement filed showing that accounts receivable had been assigned (Ex. 3).

5. February 27, 1964 to March 4, 1964—Rose City and two other secured creditors collect accounts receivable directly from debtors (Ex. 39).

5.A. April 22, 1964—Portland Reporter Publishing Company, Inc. merges into Portland Newspaper Publishing Company, Inc. which continues to publish the "Portland Reporter" (Ex. 11).

6. September 28, 1964—Rose City and other secured creditor start to collect all accounts receivable directly from debtors (Ex. 36).

7. October 15, 1964—Bankruptcy petition filed (Tr. of R. p. 129).

8. December 15, 1964—Trustee in Bankruptcy files petition to have Rose City and other secured creditors pay over proceeds of assigned accounts (Tr. of R. p. 130).

9. May 25, 26, 27 and June 10, 1965—Referee conducts trial (Tr. of R. p. 131).

10. February 9, 1966—Referee rejects Rose City's secured claim (Tr. of R. p. 1).

11. March 11, 1966—Rose City files petition for review (Tr. of R. p. 131).

12. January 27, 1966—District Court hears arguments (Tr. of R. p. 135).

13. August 22, 1967—District Court opinion reverses Referee and sustains validity of Rose City secured claim (Tr. of R. p. 89).

14. November 7, 1967—District Court opinion denies contention that Davis entitled to payment from accounts assigned to Rose City (Tr. of R. p. 114).

15. November 7, 1967—District Court enters final order (Tr. of R. p. 136).

16. December 5, 1967—Trustee files notice of appeal from that portion of final order "reversing the order of the Referee disallowing the claim of Rose City Development Company, Inc." (Tr. of R. p. 117).

17. May 23, 1968—Trustee files opening brief in this court.

ARGUMENT

A. Issues not properly before this court.

1. The trustee may not raise in this court for the first time the contention that a new financing statement and security agreement had to be signed and filed after the corporate merger of Portland Reporter Publishing Company, Inc. and Portland Newspaper Publishing Company, Inc., when this issue was not raised before the referee or before the District Court.

On December 15, 1964, the trustee in bankruptcy in this case filed his petition to have Rose City and other secured creditors pay over proceeds of assigned accounts (Tr. of R. p. 130).

On May 23, 1968, three years and six months later, the trustee raised in this court for the first time the contention that a new financing statement and security agreement had to be signed and filed after the corporate merger of Portland Reporter Publish-

ing Company, Inc. and Portland Newspaper Publishing Company, Inc. (Tr. Br. p. 10).

Since December 15, 1964, the bankruptcy docket contained in the transcript of record (p. 129 et. seq.) shows that the trustee filed objections to claims of secured creditors, three briefs before the referee, and three more briefs in the District Court. There were four days of trial before the referee and two oral arguments before the District Court. Yet at no time did the trustee consider this argument of the change of name of sufficient importance to raise it in any way.

11 U.S.C. sec. 47(a) gives this court authority "to review, affirm, revise, or reverse" the District Court. It is an imposition on this court to ask for consideration of a new issue.

The cases uniformly hold that a new issue in a bankruptcy proceeding cannot be raised for the first time in the Court of Appeals. *Briskin* v. *White*, 296 F.2d 132 (9th Cir., 1961); *In re Ben Weiss Co.*, 271 F.2d 234 (7th Cir., 1959); *O'Dell* v. *U. S.*, 326 F.2d 451 (10th Cir., 1964); *Britton* v. *Western Iowa Co., In re Hicks-Fuller Co.*, 9 F.2d 488 (8th Cir., 1925). Each of these cases are bankruptcy appeals. The 7th, 8th, 9th, and 10th Circuits have all refused to consider new issues in bankruptcy appeals.[1]

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[1] See Appendix for a summary of other reasons why this new argument of the trustee should be ignored, which summary is presented without in any way waiving our contention that this issue is not properly before this court.

2. The trustee may not raise in this court the contention that the trustee may subrogate to any subordination rights of Davis against Rose City when Davis' subordination rights were denied by the District Court in its final order and excluded by the trustee in his notice of appeal.

On December 13, 1963, Rose City and the Reporter entered into an agreement which provided as follows:

> "The Accounts Receivable Loan and Security Agreement between the parties dated November 22, 1963 is hereby modified so as to provide that the agreement of this date between Reporter and Robert J. Davis and the assignment of accounts receivable which may take place from time to time in accordance with the provisions of that agreement shall take precedence over the agreement of November 22, 1963, between these parties." (Ex. 15)

Davis argued to the District Court that this was a subordination agreement which entitled Davis to be paid out of Rose City's assets. The trustee stayed neutral. After receiving briefs and oral argument Judge Solomon held that:

> "Neither counsel for Davis nor I have been able to find any authority for Davis' contention that his invalid claim should be paid from the amounts payable to Rose City on its valid claim . . . Davis' contention that he is entitled to payment from the accounts validly assigned to Rose City is therefore denied." (Tr. of R. p. 114)

On November 7, 1967, the same day as the mem-

orandum opinion, Judge Solomon entered his final order which provided as follows:

> "Based upon the opinions of the Court dated August 22, 1967, and November 7, 1967, the order of the Referee is affirmed except as to the claim of Rose City Development Company, Inc., which is reversed.
>
> The subordination agreement between Rose City Development Company, Inc., and the Portland Reporter Publishing Company, Inc., does not entitle Robert J. Davis to be paid out of the assets assigned to Rose City Development Company, Inc." (Tr. of R. p. 115)

The trustee then filed the following notice of appeal:

> "NOTICE IS HEREBY GIVEN, that Everette H. Williams, Trustee in bankruptcy of the above named, does hereby appeal to the United States Court of Appeals for the Ninth Circuit *from that portion of the Final Order* of the Honorable Gus J. Solomon, Judge of the United States District Court for the District of Oregon, entered in these proceedings on the 7th day of November, 1967, *reversing the order of the Referee disallowing the claim of Rose City Development Company, Inc.*" (Tr. of R. p. 117) (emphasis added).

The trustee thus made it crystal clear that he was appealing from the first paragraph of the final order and not from the second paragraph. Davis appealed from the second paragraph but then abandoned that portion of his appeal (Davis Br. 13). The second paragraph of the final order is now the law of this case. The

remand to the referee suggested by the trustee is useless because the referee is bound by Judge Solomon's unappealed decision (Tr. Br. p. 50). Davis has no subordination rights. The trustee can only claim subrogation rights as the privy of Davis. The trustee sought no subrogation rights either before the referee or the District Court. It is now too late to raise such a claim for the first time in this court. *DeVille* v. *Shell Oil Company*, 366 F.2d 123 (9th Cir., 1966); *Donovan* v. *Esso Shipping Co.*, 259 F.2d 65 (3rd Cir. 1958); *Ruckman and Hansen, Inc.* v. *Contracting and Material Co.*, 328 F.2d 744 (7th Cir., 1964); *Carter* v. *Powell*, 104 F.2d 428 (5th Cir., 1939), reh. den., 104 F.2d 1012 (1939), cert. den., 308 U.S. 611, 60 S. Ct. 173, 84 L. Ed. 511 (1939); and cases cited in Section 1 above.

B. Issues properly before this court.

1. Introduction

This case is apparently the first presented to any United States Court of Appeals in which a trustee in bankruptcy has challenged the legal validity of accounts receivable financing as authorized by the Uniform Commercial Code. The decision of Judge Solomon upholding the validity of the Rose City security agreement should be affirmed for the following reasons:

1. It upholds the intention of the parties to the Loan and Security Agreement.

2. It upholds generally accepted business practice.

3. It upholds the financing needed by small businessmen.

4. It upholds the intention of Section 60 of the Bankruptcy Act not to interfere with open secured credit not preferential in intention or fact.

5. It upholds the law of the state of Oregon.

6. It upholds the law adopted by Congress for the District of Columbia and by the legislature of every state in the union except Louisiana.

2. The District Court was correct in holding that the bankrupt did not give a voidable preference to the secured creditor, Rose City, when the level of assigned accounts receivable remained approximately constant during the four months before bankruptcy and always exceeded the amount of the debt.

Rose City loaned money to the Reporter and received an assignment of accounts receivable as security for the loan eleven months before bankruptcy. The original Rose City loan was $55,300 which was reduced at the time of the bankruptcy to $53,122.26 (Ex. 17). DuBay and Davis were other secured creditors who had interests in specific accounts to secure $50,000. On June 15, 1964, the balance of billed accounts of Reporter was $144,255.70. On September 28, 1964, the day when Rose City began collecting the accounts directly from the debtors in accordance with the security agreement, the balance was $141,463.48. The balance never fell below the June 27, 1964 total of $129,482.50. Circulation accounts of about $50,000 were billed at the end of June and 27/30th were earned on June 27th, so the total in accounts receivable on the low date was about $175,000 (Ex. 39).

Judge Solomon found that:

> "From June 15, 1964, to September 28, 1964, accounts totaling $397,860.24 were collected by *The Reporter*, and these were replaced by new accounts totaling $395,085.87." (Tr. of R. p. 100).

Section 60 of the Bankruptcy Act provides:

> "A preference is a transfer, as defined in this title, of any of the property of a debtor to or for the benefit of a creditor for or on account of an antecedent debt, made or suffered by such debtor while insolvent and within four months before the filing by or against him of the petition initiating a proceeding under this title, *the effect of which transfer will be to enable such creditor to obtain a greater percentage of his debt than some other creditor of the same class.*" 11 U.S.C. sec. 96 (a) (1) (emphasis added).

When the accounts receivable of a daily newspaper are assigned there is a continuous substitution of collateral. New advertising is placed in the paper and new papers are sold creating new receivables which replace the old receivables which are collected. Rose City was never unsecured because there always was more than an adequate level of receivables. There were no transfers to give Rose City a greater percentage of its debt since the level of accounts remained nearly a constant during the preference period until the time came when Rose City collected the accounts directly from the debtors. Thus there could be no preferential transfer.

Judge Solomon stressed:

"There is no preference when new accounts are substituted for released old ones. See: *In Re Pusey Maynes, Breish Co. Herr* v. *Philadelphia Nat. Bank*, 3 Cir. 1941, 122 F.2d 606."

* * * * *

"These figures show that Rose City shortly before *The Reporter's* bankruptcy did not try to improve its position or grab assets which belonged to all creditors in the same class. I find that Rose City did not receive a preferential transfer and that it has a valid security interest in all the accounts receivable of *The Reporter* whether they came into existence before or within four months of the bankruptcy" (Tr. of R. p. 100).

The brief of the trustee makes several arguments against this substitution of collateral portion of the District Court opinion:

1. "...[A] secured party who fails to police his collateral *probably* will be unable to demonstrate that the releases of collateral occurred at the requisite points in time." (Tr. Br. p. 44). (emphasis added)

Exhibit 39 shows the daily accounts receivable charges. These sums plus the unbilled circulation receivable which increased regularly during the month prove that there always was far more collateral than the $105,000 of secured debt. The trustee's "probably" argument, therefore, does not relate to the facts of this case.

2. "...[I]t is entirely likely that to some extent at least the figures in the credit column reflect the writeoff of uncollectible accounts or the issuance of credit memos." (Tr. Br. p. 45).

These comments are pure speculation without any support in the record. The trustee has the burden of proving a preferential transfer. *Keenan Pipe and Supply Co.* v. *Shields*, 241 F.2d 486 (9th Cir., 1956).

> 3. "Moreover, the figures do not show the account balances during any given day; the books apparently show balances only at the end of a day." (Tr. Br. p. 46).

These comments might have had some validity if the collateral consisted of a small number of receivables each of great value.

Actually, the Reporter on July 1, 1964, had more than 700 separate display advertisers and more than 600 classified advertisers (Ex. 33). The Reporter had over 50,000 subscribers (i.e., separate circulation receivables.) (Ex. 33). The margin of security over debt was such that no one collection no matter whether received before or after lunch could leave Rose City unsecured.

> 4. "...[T]he trustee was able to recover only a gross amount of approximately $127,000, and a net of only $107,000 after collection costs (Ex. 27)." (Tr. Br. p. 47).

The value of accounts receivable must be measured by their worth to a going business, not after bankruptcy. The fact that $127,000 could be collected up to the time of the hearing before the referee (with collections continuing) from over 50,000 separate advertising and circulation debtors is good evidence of the strength of the receivables. Indeed, this was in fact

more than was needed to cover the secured claims of Rose City, DuBay and Davis.

The case before this court has created a great deal of interest and many law review articles and comments have been written about the referee and District Court decisions.[2] Almost all of the commentators urge that accounts receivable financing under the Uniform Commercial Code be sustained. Many argue that a finding that there was a substitution of collateral and therefore no preferential transfer may be the fairest way of maintaining the billions of dollars of accounts receivable financing in the American economy.

The advantage of this approach is that it arises solely as the proper interpretation of Section 60 of the Bankruptcy Act and does not require a compar-

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[2] *After-Acquired Property Security Interests in Bankruptcy: A Substitution of Collateral Defense of the U.C.C.*, 77 Yale L. J. 139 (November, 1967); *Games Lawyers Play With the Bankruptcy Preference Challenge to Accounts and Inventory Financing,* William E. Hogan, 53 Cornell L. R. 553 (April, 1967); *The Interpretation of the Uniform Commercial Code: Article 9 in the Bankruptcy Courts,* Ray D. Henson, 22 U. of Miami L. R. 101 (Fall, 1967); *The Portland Case,* Ray D. Henson, 1 Ga. L. R. 257 (Winter, 1967); *The Code and the Bankruptcy Act: Three Views on Preferences and After-Acquired Property,* Sidney Krause, Homer Kripke, Charles Seligson, 42 New York U. L. R. 278 (April, 1967); *Bankruptcy Preferences—Secured Transactions—Security Interest in After-Acquired Property is Voidable Preference if Received Within Four Months of Bankruptcy—In re Portland Newspaper Publishing Co.,* 65 Mich. L. R. 1004 (March, 1967); *The Floating Lien Under the U.C.C.,* John W. Wyatt, 5 Am. Bus. L. J. 293 (Winter, 1967); *Secured Transactions—The Code in the Bankruptcy Courts, Some Significant Conflicts of Policy,* F. Anthony Malo, 85 Banking L. J. 19 (Jan., 1968).

ison with the language of the Uniform Commercial Code. It is also consistent with the practical expectancies of the parties to a security agreement. Debtor and secured creditor understand that entirely apart from any bankruptcy law theories the secured creditor only remains secured in fact if at any given time there is more security than debt. If the security ever falls below the debt, then another court in another case with those facts might look to the balance at the start and end of the preference period, or might hold that the secured creditor was only entitled to part of his security. But in our case Rose City never had a preference in fact because its security was always more than the debt.

The substitution of collateral approach does seem to be a good way of carrying out the admonition of Judge Solomon in his opinion below—"Good business practice should be good business law." (Tr. of R. p. 99). In our case this would sustain the Rose City security agreement.

3. The District Court was correct in holding that the "floating lien" section of the Oregon Uniform Commercial Code (which is identical with the law of the District of Columbia and every state except Louisiana) is valid.

a. The parties to the "Loan and Security Agreement" intended that the lien cover all present and future accounts receivable and their intention can be carried out.

On November 26, 1963, eleven months before bankruptcy, Reporter assigned to Rose City "all accounts

receivable of the debtor now existing or hereafter arising (herein called accounts)" (Ex. 17).

Section 60(a)(2) of the Bankruptcy Act provides:

> ". . . a *transfer* of property other than real property shall be deemed to have been made or suffered at the time when it became so far *perfected* that no subsequent lien upon such property obtainable by legal or equitable proceedings on a simple contract could become superior to the rights of the transferee." (11 U.S.C. sec. 96(a)(2) (emphasis added).

The first question presented is when were the accounts "hereafter arising" "transferred"—the date of the security agreement or the date when the advertising was placed in the Reporter and the charge placed on the company books. ORS 79.2040 (UCC 9-204) tells us that this happens when "the debtor has rights in the collateral" which cannot occur "until it comes into existence." The trustee argues that the collateral was the money due when each newspaper was sold or when each classified or display ad was placed in the Reporter. The collateral as defined by the trustee on any given day consisted of over 50,000 separate items, none of which "existed" the day before.

But is it necessary to fragment the collateral in this way? The newsboy on his route would consider each subscriber as the entity in existence, rather than each separate edition that he delivered to that subscriber. The Reporter advertising salesman would consider Montgomery Ward as one continuing, existing

advertising account. Rose City, the secured creditor, did not look to any particular subscriber or advertiser but rather to the total level of the accounts as one entity. The Loan and Security Agreement provides that "The aggregate amount of the loans shall not exceed 75% of the net value of the qualified collateral." (Ex. 17). Neither the borrower nor the secured lender, the two parties to the agreement being construed in this case, thought of the collateral or its existence as narrowly as defined by the trustee.

This issue of what is the collateral and when does it exist has now been decided by four United States District Courts. Every one has rejected the fragmentation sought by the trustee and ruled that the collateral was a single existing entity, and the transfer therefore took place when the accounts receivable assignment agreement was made. *Rosenberg* v. *Rudnick*, 262 F. Supp. 635 (D. Mass., 1967) (Ford, J.); *In re Portland Newspaper Publishing Company, Inc.*, 271 F. Supp. 395 (D. Oregon, August 22, 1967) (Solomon, J.) (Tr. of R. p. 89); *In re White*, 4 C.C.H. Installment Credit Guide § 97,945, p. 88,645 (S.D. Ohio, W.D., October 30, 1967) (Hogan, J.); *In the Matter of Grain Merchants of Indiana, Inc.*, Bankruptcy No. 7259 (N.D. Indiana, Fort Wayne Division, July 8, 1968) (Eschbach, J.)

The Massachusetts court stated in *Rosenberg* v. *Rudnick*, supra:

> "In applying sec. 60, however, inventory subjected to a security interest should be viewed

> as a single entity and not as a merge conglomeration of individual items each subject to a separate lien. 'In other words, the *res* which is the subject of the lien . . . is the merchandise of stock in trade, conceived of as a unit presently and continuously in existence—a 'floating mass,' the component elements of which may be constantly changing without affecting the identity of the *res.*' *Manchester National Bank* v. *Roche,* 1 Cir., 186 F.2d 827, 831. The whole security interest is in the entity as a whole, not in its individual components, and the transfer of property occurs when this interest in the inventory as an entity is created. *Matthews* v. *James Talcott, Inc.*, 7 Cir., 345 F.2d 374, 380." (262 F. Supp. at 639).

The Oregon court in our case set forth and approved this quotation from the Massachusetts case.

The Ohio court in *In re White,* supra, relied on the Massachusetts and Oregon cases without discussion.

The Indiana court in *In the Matter of Grain Merchants of Indiana, Inc.*, supra, stated:

> "In modern finance, it is far more realistic to view the entire stock of accounts receivable together as a single asset subject to a single security interest than to view individual accounts as separate assets subject to separate security interests." (citing the Massachusetts and Oregon cases). (Memorandum of Decision and Order at 18).

Another way of reaching the same result is by relying upon the portion of Section 60(a)(2) of the Bankruptcy Act which provides that there is no voidable preference when the lien has been "perfected" prior to the four month preference period. In the case of *In the Matter of Grain Merchants of Indiana, Inc.*, supra, the court pointed out:

> "The provision for time of transfer in Section 60(a)(2) of the Bankruptcy Act looks to the time when, under the applicable state law, subsequent lien creditors are precluded from establishing a claim superior to that of the transferee. Under Burns Ind. Stat. sec. 19-9-204(3), the Union Bank could and did acquire a security interest in Grain Merchants' stock of accounts receivable valid against 'lien creditors' at the time Union Bank filed its financing statement as required by the Indiana Uniform Commercial Code." (Memorandum of Decision and Order at 12).

The court in *Rosenberg* v. *Rudnick*, supra, also stresses that:

> "Perfection under state law need not be full perfection but only perfection *so far* as is necessary to meet the test of § 60(a)(2). While the Massachusetts law may not regard a security interest in after-acquired inventory as fully perfected until it attaches to items as they are acquired by the debtor, nevertheless § 9-204(3) recognizes that a lien in such inventory items can be validly created by a security agreement." (262 F. Supp. at 638).

Thus the *Rosenberg* case holds that the lien is perfected for the purposes of Section 60 whether or not the receivable then "exists."

Whether stress is placed on the word "transfer" or the word "perfected" in Section 60(a)(2) of the Bankruptcy Act, the same result is reached—the security interest of Rose City attached to the receivables "hereafter arising" on November 22, 1963, the date of the security agreement.

The accounts receivable of the Reporter should be considered as a group. The result will be that the lien attaches to the "accounts" in accordance with the practical understanding of the parties to the Loan and Security Agreement," and their intention will be carried out.

b. The Oregon Uniform Commercial Code specifically protects the Rose City lien and there is nothing in federal law which requires a contrary conclusion.

The federal Bankruptcy Act provides that:

> "A preference is a transfer of . . . any of the property of a debtor . . . for or on account of *an antecedent debt* . . .". 11 U.S.C. 96(a)(1) (emphasis added).

Federal law does not define "an antecedent debt." Judge Ford in *Rosenberg* v. *Rudnick* says that state law cannot be looked to for a definition. This court has stated:

> "Nor does the fact of bankruptcy, save insofar as is specifically provided for in the Bankruptcy Act (11 USCA), affect the validity of

> liens authorized by state law." *Mason* v. *Citizens' National Trust and Savings Bank*, 71 F.2d 246, 248 (9th Cir., 1934).

Since state law defines the validity of the lien, it can be argued that state law can define the meaning of the words that determine validity. The Oregon law provides:

> "Where a secured party makes an advance, incurs an obligation, releases a perfected security interest, or otherwise gives new value which is to be secured in whole or in part by after-acquired property his security interest in the after-acquired collateral shall be deemed to be taken for new value and not as security for an antecedent debt if the debtor acquires his rights in such collateral either in the ordinary course of his business or under a contract of purchase made pursuant to the security agreement within a reasonable time after new value is given." ORS 79.1080 (UCC 9-108).

Rose City has complied with all the requirements of this section. Rose City advanced money, was given security in part by after-acquired property, and the Reporter acquired its rights in the accounts receivable in the ordinary course of its business. Therefore Rose City's security interest in the accounts receivable "hereafter arising" "shall be deemed to be taken for new value."[3]

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[3] The trustee suggests that Rose City did not in fact give new value (Tr. Br. p. 25). On November 22, 1963 Rose City loaned $10,300 of new money and received a security agreement covering that loan and the $45,000 consolidated in one

The Congressional history of the federal Bankruptcy Act makes clear that no conflict was intended with normal accounts receivable financing. There is a careful analysis of the 1950 House of Representatives reports which accompanied the latest amendments to Section 60 of the Bankruptcy Act in *In the Matter of Grain Merchants of Indiana, Inc.*, supra:

> "Congress was not satisfied with the effect which its 1938 version of Section 60 had upon secured credit, so in 1950 Congress once again amended Section 60. This amendment put Section 60 in its present form. The House Report which accompanied the 1950 amendment states:
>
> > '. . . In 1938 the Bankruptcy Act was amended to obviate the effect of [the *Sexton, Bailey, Carey,* and *Martin* cases described above], which were regarded with disfavor by

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promissory note six days earlier (Tr. p. 237). ORS 71.2010 (44) defines "Value" as follows:

> "Except as otherwise provided with respect to negotiable instruments and bank collections in ORS 73.3030, 74.2080 and 74.2090, a person gives 'value' for rights if he acquires them: . . .
>
> (b) As security for or in total or partial satisfaction of a preexisting claim; or . . .
>
> (d) Generally, in return for any consideration sufficient to support a simple contract." (U.C.C. 9-201 (44)).

Bender's UCC Service, *Secured Transactions Under UCC,* sec. 4.05, p. 284 points out, "It is clear from subsection (44) (b) of 1-201 that a security interest may secure payment of an antecedent debt." Alternatively, there was ample consideration to support a simple contract. According to 1 Corbin, *Contracts,* sec. 127: "That which is bargained for by the promissor and given in exchange for the promise by the promissee is not made insufficient as consideration by the fact that its value in the market is not equal to that which is promised." Rose City also gave the consideration of releasing the receivables on March 4, 1964 when by agreement Reporter was again allowed to make collections from the account debtors (Ex. 39).

the great majority. But in so doing, the authors of the amendment went further than was necessary, and it brought about results which they did not anticipate. The amendment placed the trustee in the position of an artificial bona fide purchaser, and, by so doing, unintentionally invalidated many types of liens acquired in good faith and for value, in normal and accepted business and financial relationships . . . . The resultant confusion has cast grave doubt upon the validity of normal business security . . . H.R. Rep. No. 1293, *supra*, 2 U.S. Code Cong. Service at 1986, 1987.'

It is therefore clear that in adopting Section 60 as it now reads, Congress intended not only to invalidate 'secret' liens, Congress also intended to give effect to legitimate forms of secured financing created in accordance with state law. The House Report clearly stated this latter purpose:

'. . . The present [1938] language of the act tends to impede and choke the flow of credit, principally to small businessmen, and the object of the bill is to free its channels.' H.R. Rep. No. 1293, *supra*, 2 U.S. Code Cong. Service at 1985.

It would be exceedingly ironic if language in a statute which was intended to facilitate secured financing were construed in a manner which discouraged such financing. Nothing in the language or purposes of Section 60 compels such a construction." (Memorandum of Decision and Order at 16-17).

There is a similar analysis in 65 Mich. L. R. 1004, 1009, supra.

In 1965, after the passage and amendment of Section 60 of the Bankruptcy Act, Congress enacted the Uniform Commercial Code for the District of Columbia, including the identical wording that is contained in ORS 79.1080 (D.C. Sec. 28:9-108). It is a basic principle of statutory construction that when the same body passes two statutes, they are to be construed if possible to avoid any conflict, and if this is not possible, the later statute controls. 2 Sutherland, Statutory Construction (3rd ed. 1943) § 5201.

The U. S. Supreme Court has stated in *St. Louis Ry.* v. *U. S.*, 251 U.S. 198, 207, 40 S. Ct. 120, 64 L. Ed. 225 (1919) that:

> "Congress must be presumed to have known of its former legislation . . . and to have passed the new laws 'in view of the provisions of the legislation already enacted.' "

New Jersey v. *Anderson*, 203 U.S. 483, 489, 27 S. Ct. 137, 51 L. Ed. 284 (1906) is a similar case specifically dealing with a bankruptcy problem. This rule of statutory construction which allows the more recent statute to control should be especially true in dealing with the Uniform Commercial Code. See *U. S.* v. *Wegematic Corporation*, 360 F.2d 674, 676 (2d Cir., 1966).

Judge Ford in *Rosenberg* v. *Rudnick,* supra, held as a matter of federal law:

> "In view of the fact that the Uniform Commercial Code has now been adopted by 48 states, it would seem that the definition of § 9-108 should be regarded as generally accepted and in

> accord with current business practice and understanding and hence applied in bankruptcy." (262 F. Supp. at 639).

Judge Solomon in our case set forth this quotation and said, "I agree with Judge Ford's decision." (Tr. of R. p. 98).

There is no reason why the law of Oregon, every state in the union except Louisiana, and the District of Columbia should be invalidated because of undefined language in Section 60 of the Bankruptcy Act. The same result is reached whether we construe Section 60 in light of good business practice, let the term "antecedent debt" be defined by state law, look to the Congressional history of Section 60, or rely on the intention of Congress in passing the Uniform Commercial Code for the District of Columbia.

CONCLUSION

The language of *Rosenberg* v. *Rudnick*, supra, could properly apply to the Rose City security agreement:

> "The transaction here was not one of those which the provisions of Sec. 60 were designed to avoid. There was nothing here in the nature of a secret lien. There was no attempt by one creditor to outrace others at the last moment before bankruptcy. Defendant here bargained for and acquired his security interest at the time he made his loan." (262 F. Supp. at 639).

Judge Solomon sums up the situation this way:

"The business community has depended upon a revolving or flow type of accounts receivable financing for many years. The trustee and Referee both concede that Rose City would have had a valid security interest if *The Reporter* had deposited the collected accounts in a separate bank account for the benefit of Rose City and then received a new loan, daily if necessary, equal to the amount of the deposit. The Code allows a financial institution or other creditor to make a loan secured by present and future accounts and permits the debtor to use the full amount of the loan without routing the proceeds of the old accounts through a cash collateral account. The old method was both expensive and cumbersome and necessarily increased the cost of money. I can find nothing either illegal or unethical in the arrangement sanctioned by the Code.

Good business practice should be good business law." (Tr. of R. p. 98-99).

The decision of the District Court upholding the security agreement of Rose City should be affirmed.

Respectfully submitted,

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APPENDIX

The Change of Name of the Bankrupt Does Not Invalidate the Security Agreement or Financing Statement.

From February 8, 1960 until April 22, 1964, the Portland Reporter was published by Portland Reporter Publishing Company, Inc. at 1714 N. W. Overton Street, Portland, Oregon (Ex. 33). On March 20, 1964 a new corporation was formed, Portland Newspaper Publishing Company, Inc., which entered into a Plan for and Merger Agreement with Portland Reporter Publishing Company, Inc. on March 27, 1964, subject to stockholder approval (Ex. 1). Over two-thirds of the stock held by over 8000 stockholders of Portland Reporter Publishing Company, Inc. approved the merger on April 22, 1964, and the Articles of Merger were filed with the Oregon Corporation Commissioner on April 30, 1964 (Exs. 1 and 5). The surviving corporation continued to publish the Portland Reporter at 1714 N. W. Overton, Portland, Oregon (Ex. 33). The Portland Reporter was a daily newspaper with a circulation of over 50,000 (Ex. 33). There is no evidence in this record of the extent to which this corporate merger of a daily newspaper was general knowledge in Portland.

The security agreement and financing statement remain valid for any of the following four reasons:

1. The surviving corporation in a merger has the liabilities and duties of the predecessor corporation including its liabilities and duties under the Accounts Receivable Loan and Security Agreement.

The merger agreement provides that the surviving corporation:

> "without other transfer, shall succeed to and possess all of the rights, privileges, powers, and immunities of Reporter and PNP, and shall be subject to the liabilities and duties of Reporter except as otherwise provided herein or in the Articles of Incorporation or By-Laws of PNP." (Ex. 19).

There are no limitations contained in the Articles or By Laws (Ex. 1).

ORS 57.480 provides for the "effect of merger or consolidation," including the following:

> "When such merger or consolidation has been effected: (1) The several corporations parties to the plan of merger or consolidation *shall be a single corporation*, which, in the case of a merger, shall be that corporation designated in the plan of merger as the surviving corporation. . . ."
>
> (5) Such surviving or new corporation shall thenceforth be *responsible and liable for all the liabilities and obligations of each of the corporations so merged* or consolidated; and *any claim existing* or action or proceeding pending by or against any of such corporations *may be prosecuted as if such merger* or consolidation *had not taken place,* or such surviving or new corporation may be substituted in its place. *Neither the rights of creditors nor any liens upon the property of any such corporation shall be impaired by such merger or consolidation.*" (emphasis added).

Even after the merger, Rose City could have sued

Portland Reporter Publishing Company, Inc. for a breach of the security agreement. No rights of Rose City or liens upon accounts receivable *"shall be impaired by the merger."* This was *"a single corporation."* Its accounts receivable continued to be subject to Rose City's security agreement by operation of Oregon law.

There appear to be no Oregon cases on the effect of this statutory language. In *Jackson* v. *Continental Telephone Company*, 28 Cal. Rptr. 1, 212 Cal. App. 510 (1963), the California court quoting from another case stated:

> "Although the distinct corporate entity of [the old corporation] passed out of existence or became extinct upon the completion of the act of consolidation, its corporate activities did not cease but were continued and carried on through the new channel. . . The consolidation did not create an entirely new entity but 'merely directs the blood of the old corporation into the veins of the new, the old living in the new.' "

In a Texas case, *Morris Plan Life Insurance Co.* v. *Wells*, 387 S.W.2d 84 (Tex. Civ. App., 1965) it was held:

> "Any claim may be prosecuted as if such merger had not occurred. Neither the rights of creditors nor any lien shall be impaired by such merger." (387 S.W. at 87).

In both cases the statute was similar to ORS 57.480 and the surviving corporation was held liable for the debts of the old corporation.

2. Under the Oregon Uniform Commercial Code a financing statement remains effective for five years, without regard to any change of name of the debtor.

ORS 79.4030(2) provides in part:

> "A filed financing statement which states a maturity date of the obligation secured of five years or less is effective until such maturity date and thereafter for a period of 60 days. Any other filed financing statement is effective for a period of five years from the date of filing." (UCC 9-403(2)).

No action of the debtor in merging with another corporation, changing its name, or even transferring the collateral can defeat the rights of the secured party. There is no requirement that a new financing statement be filed by the secured creditor if any of these events occur. If this were not so, no lender could ever rely on the protection of the Uniform Commercial Code.

3. Under the Oregon Uniform Commercial Code the security interest continues in the collateral notwithstanding transfer by the debtor.

ORS 79.3060(2) provides:

> "Except where ORS 79.1010 to 79.5070 otherwise provide, a security interest continues in collateral notwithstanding sale, exchange or other disposition thereof by the debtor unless his action was authorized by the secured party in the security agreement or otherwise, and also con-

> tinues in any identifiable proceeds including collections received by the debtor." (UCC 9-306(2)).

This section makes even clearer that a transfer of the collateral by the debtor cannot defeat the secured creditor. The trustee argues that the accounts receivable at issue "are the bankrupt's accounts; they never belonged to the predecessor corporation." This is just a reargument of the trustee's basic disagreement with Judge Solomon's decision. The accounts receivable of the Reporter were one group, with new collateral continually substituting for old collateral.

4. Under the Oregon Uniform Commercial Code minor errors in the financing statement do not affect its validity.

ORS 79.4020(5) provides:

> "A financing statement substantially complying with the requirements of this section is effective even though it contains minor errors which are not seriously misleading." (UCC 9-402(5)).

The financing statement was filed showing the debtor as Portland *Reporter* Publishing Company, Inc., and signed by Robert D. Webb (Ex. 3), while the name of the surviving corporation was Portland *Newspaper* Publishing Company, Inc. The same newspaper continued to be published at the same address (Ex. 33). There is no evidence that any supplier or employee (trade creditors) of the newspaper was misled in any way. If any supplier or employee was in doubt about the merger or its effect, an inquiry at

1714 N. W. Overton Street would have produced the necessary information.

In the case of *In the Matter of Excel Stores, Inc.*, 341 F.2d 961 (2nd Cir., 1965), the name of the debtor in the security agreement was listed as "Excel Department Stores" rather than the correct name of "Excel Stores, Inc." The opinion noted that Excel did business with its name "Excel" prominently displayed on the store. The court there applied this same statutory section and held that this was a minor error not seriously misleading:

> "It is clear that the parties intended to execute a valid and binding contract . . . Nor can it be doubted that any creditor of Excel or other interested person searching the record would come to the Excel Department Store at the Shopping Center of Pawcatuck, find Machado's name and be put on notice that a lien against Excel might be outstanding and that communication with Machado might be appropriate. This is precisely all that the code requires. See Official Comment to U.C.C. Section 9-402." (341 F.2d at 963).

Communication with Robert D. Webb, publisher of Reporter before the merger and assistant publisher after the merger (Ex. 33) would have been appropriate for any trade creditor.

Another similar case is the referee's decision in *In re Bengtson*, 40 Conn. Bar J. 57, 3 U.C.C. Rep. Serv. 283 (D. Conn, 1965). The debtor was Bruce R. Bengtson and he signed the form, but the debtor was shown on the financing statement as "Bruces

Vernon Circle Serv., Vernon, Connecticut." The referee points out, "A telephone inquiry to the Secretary of State failed to disclose any record of a financing statement having been filed in the bankrupt's name." (3 U.C.C. at 287). Despite this, the referee upheld the validity of the financing statement saying that

> ". . . all that the statute requires is the *signature and mailing address* of the debtor." (3 U.C.C. at 287).

The trustee then attacked the sufficiency of the address, but the referee responded:

> "Even though it is not as precise as it could be, the criterion should be whether it is sufficient to enable mail to be delivered. Vernon Circle is a well known landmark and mail would be delivered there." (3 U.C.C. at 287).

Other cases to the same effect are *In the Matter of Kulesza*, 4 U.C.C. Rep. Serv. 66, 4 U.C.C. Installment Credit Guide par 98,076, p. 88,749 (W.D. Mich., 1967) and *In re Vaughan*, 4 U.C.C. Rep. Serv. 61 (W.D. Mich., 1967) where misspellings on the certificate of title in one case and on the financing statement in the other were upheld since there was adequate notice and no one was misled. In our case, there was adequate notice and there is no evidence that anyone was misled.